No. 83-2004

In the Supreme Court of the United States

OCTOBER TERM, 1984

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL.,
PETITIONERS

v.

ZENITH RADIO CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

1. Whether the court of appeals should have upheld the grant of summary judgment for the defendants in this antitrust conspiracy case on the ground that the defendants' allegedly culpable actions were no more consistent with an inference of conspiracy than with an inference of independent action.

2. Whether the court of appeals erred in concluding that a finder of fact could find Japanese companies liable for a violation of the Sherman Act based in part on conduct compelled by the Government of Japan.

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INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcement of the federal antitrust laws, and thus has a substantial interest in assuring that those laws are construed in a manner that advances their objectives. The United States also has exclusive responsibility for the conduct of relations with foreign nations and thus has a substantial interest in assuring that the construction and enforcement of federal laws do not unnecessarily harm international relationships. At this Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. In this 14 year-old lawsuit, respondents Zenith Radio Corporation and National Union Electric Corporation, American television manufacturers, charge that 24 com-

panies (21 of which are petitioners here) participated in a 20-year conspiracy to drive American television manufacturers out of business by selling television receivers at artificially high prices in Japan, and by using the profits thus obtained to finance the sale of televisions at artificially low prices in the United States.[1] Respondents named as defendants all Japanese television manufacturers, their United States subsidiaries, and several Japanese trading companies, as well as Sears Roebuck & Co. and Motorola, Inc., which were major customers of the Japanese companies. Respondents claimed that various aspects of the alleged conspiracy violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2; Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 18; Section 73 of the Wilson Tariff Act, 15 U.S.C. 8; and the Antidumping Act of 1916, 15 U.S.C. 72.

After eight years of discovery, petitioners filed motions for summary judgment.[2] The district court adopted a comprehensive case management procedure for resolving these motions on the enormous record. The court required respondents to identify—with preclusive effect—all the evidence on which they planned to rely at trial;[3] the court then held a five-week evidentiary hearing and ruled on the admissibility of that evidence before considering the summary judgment motions. In brief, the court ruled

[1] Respondents also alleged that the purported conspiracy involved the sale of consumer electronic products other than television sets. However, the case has focused almost entirely on television sets. See Pet. App. 247a n.7.

[2] During discovery the parties produced hundreds of thousands of documents and took hundreds of depositions, although respondents took no substantive deposition of any Japanese businessman alleged to have been involved in the conspiracy (see Pet. App. 402a-406a, 795a-799a).

[3] Respondents' Final Pretrial Statement, which constituted their complete offer of proof on the antitrust claims, exceeded 17,000 pages, with "cross-references [to] approximately 50,000 pages of documents." Pet. App. 268a.

that, for various reasons, a large part of the evidence on which respondents chiefly relied was inadmissible and thus could not be used to defeat summary judgment (see Pet. App. 668a-776a, 777a-987a, 988a-1110a). The district court subsequently ruled, in a 430-page opinion, that all petitioners were entitled to summary judgment on all antitrust counts, primarily because respondents had failed to present any admissible, probative evidence that would establish the existence of the alleged conspiracy (*id.* at 236a-667a). The district court thus found it unnecessary to rule on petitioners' contention that much of their allegedly anticompetitive conduct was compelled by the Government of Japan and for that reason could not form the basis of an antitrust violation (*id.* at 225a n.19, 387a-394a).[4]

In an earlier opinion the district court had rejected most of respondents' dumping claims on the ground that the products sold in the United States and the products sold in Japan were not sufficiently comparable to support such claims (Pet. App. 1111a-1214a). In its opinion granting summary judgment on the antitrust allegations, the district court rejected the remaining dumping claims (*id.* at 632a n.372).

2. The court of appeals reversed the district court's grant of summary judgment on all antitrust counts, except as to defendants Sony, Sears, and Motorola (Pet. App. 34a-197a). The court of appeals explicitly approved the innovative procedure used by the district court to resolve the summary judgment motions on the massive record (*id.* at 60a-66a). The court of appeals concluded,

[4] In 1977 and 1978, at respondents' request, the Antitrust Division of the Justice Department conducted a thorough examination of what respondents characterized as the most probative evidence of the alleged conspiracy. Like the district court, the Division found "no evidence of concerted predatory conduct intended to destroy and supplant the U.S. color TV industry, either at an earlier period of time or at the present time." Pet. App. 23a (statement of Assistant Attorney General John H. Shenefield).

however, that many of the district court's evidentiary rulings were wrong. In particular, the court of appeals found that the district court had erred in excluding certain records of Japanese administrative proceedings against some petitioners in connection with resale price maintenance activities in Japan, various internal documents of petitioners (such as diaries and memoranda), and the testimony of respondents' experts based on those records and documents. *Id.* at 64a-162a.

After thus augmenting the body of evidence to be weighed in deciding the summary judgment motions, the court of appeals proceeded to consider whether respondents' antitrust theory could withstand scrutiny in light of that evidence. In the court of appeals' view, a fact-finder reasonably could conclude from the admissible evidence that: (a) petitioners agreed to stabilize prices of televisions in Japan; (b) the domestic and international competitive situation of the Japanese television manufacturing industry gave petitioners a motive to enter into the alleged conspiracy; (c) petitioners entered into formal written agreements that established minimum prices (or "check prices") for television sets sold for export to the United States; (d) petitioners allocated customers in the United States by means of the so-called "five-company rule," pursuant to which each petitioner agreed to sell directly to only five customers in the United States (including each manufacturer's United States sales subsidiary); (e) petitioners' prices for televisions sold in the United States were substantially lower than their prices for comparable televisions in Japan and, in fact, were "dumping prices" that might support an inference of predatory intent; and (f) petitioners deceived the Japanese and American governments as to the prices being charged in the United States by systematically giving secret rebates to United States purchasers, in a context in which each petitioner knew that its Japanese rivals also were giving rebates (Pet. App. 169a-180a). The court of appeals concluded that this amounted to sufficient

evidence of the alleged conspiracy to preclude the entry of summary judgment for petitioners on the antitrust counts (*id.* at 180a).

The court of appeals also rejected petitioners' contention that they were entitled to summary judgment because the Japanese Ministry of International Trade and Industry (MITI) had compelled them to abide by the check price agreement and make use of the five-company rule, two factors that the court regarded as key pieces of evidence tending to establish the conspiracy alleged by respondents (Pet. App. 188a-189a). In support of their contention, petitioners had cited a formal statement submitted by MITI to the district court in 1975 (*id.* at 6a-14a), which declared that MITI had compelled certain aspects of petitioners' conduct. The court of appeals "assume[d], without deciding, that a government-mandated export cartel arrangement fixing minimum export prices would be outside the ambit of section 1 of the Sherman Act" (*id.* at 188a). But the court added that it "cannot be said with any degree of certainty that" the check prices "were in fact determined by the Japanese Government," and asserted that there was "no record evidence suggesting that the five-company rule originated with the Japanese Government" (*id.* at 188a-189a).[5] The court of appeals accordingly relied on the check price agreement as one of the crucial pieces of evidence of the alleged conspiracy that would preclude the grant of summary judgment (*id.* at 179a).[6]

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[5] Somewhat inconsistently, the panel's separate opinion on the Antidumping Act issues (Pet. App. 198a-223a) did "assume" that the check price agreements had been "mandated by" MITI (*id.* at 220a).

[6] The court of appeals affirmed the grant of summary judgment in favor of defendants Motorola and Sears because there was no evidence that either company was aware of the resale price maintenance conspiracy in Japan, the five-company rule, or the alleged concerted action by the other defendants to evade the check price agreements imposed by MITI (Pet. App. 176a, 180a-183a). The

The same panel of the court of appeals issued a separate opinion reversing the district court's dismissal of the dumping charges except as to Sony, Sears, and Motorola. Pet. App. 198a-223a. The court concluded that the products sold in Japan and those sold in the United States were sufficiently comparable to satisfy the requirements of the Antidumping Act (Pet. App. 211a-214a); that there was evidence of a significant price differential between the two categories of products (*id.* at 216a-218a); and that there was a genuine issue as to whether petitioners acted with the requisite specific intent (*id.* at 218a-223a).[7]

SUMMARY OF ARGUMENT

A. In setting aside the award of summary judgment, the court of appeals disregarded the import of *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 280, 285-288 (1968). That case establishes that an antitrust plaintiff seeking to prove the existence of an anticompetitive conspiracy on the basis of circumstantial evidence can defeat summary judgment only by showing that the evidence is more consistent with an inference that the challenged conduct resulted from the alleged conspiracy than with an inference that it was the result of independent action. This rule forestalls the possibility that parallel behavior manifesting only the workings of a competitive market will be deemed illegal, an outcome that could well penalize unilateral, procompetitive conduct that is benefitting consumers.

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court also affirmed summary judgment in favor of defendant Sony on the grounds that Sony never gave rebates, never sold at dumping prices, and occupied the high end of the price spectrum (*id.* at 183a-185a).

[7] None of the questions presented in the petition explicitly addressed the antidumping charges. Petitioners nevertheless state that they challenge the antidumping decision insofar as it rests on the same conspiracy evidence as the antitrust charges. Pet. 8. The United States takes no position on the correctness of the court of appeals' antidumping decision.

The court of appeals believed that it was free to depart from the *Cities Service* standard because respondents had adduced not only evidence of parallel conduct, but also "direct" evidence that petitioners had colluded—that is, evidence that petitioners had entered into a retail price maintenance agreement concerning sales in Japan, and had adhered to the check price agreement and the five-company rule in exporting televisions to the United States. But that evidence did not have any necessary tendency to establish the existence of the alleged agreement to charge predatory prices in the United States. At best, the evidence cited by the court of appeals pointed up the opportunity for collusive activity, and thus constituted only additional circumstantial evidence of the alleged predatory pricing agreement. The "direct" evidence in this case therefore does not obviate the need to address the central inquiry of *Cities Service*: whether the parallel low pricing behavior cited as the crucial element of the alleged conspiracy is more reasonably viewed, in the context of the additional circumstantial evidence, as the result of collusion rather than of independent action.

Here, the evidence is at least as consistent with a theory of independent conduct as it is with conspiracy. As the district court recognized, petitioners' parallel activities were plausibly explained as independent efforts to penetrate a new market. And the economic illogic of respondents' theory also makes it unlikely that petitioners were engaging in concerted predatory conduct. In these circumstances, the district court's award of summary judgment to petitioners was entirely appropriate.

B. The court of appeals also erred by directly predicating its reversal of the district court in part on evidence of conduct by petitioners that had been compelled by the Japanese government. As this and other courts have suggested, activity that is compelled by a foreign sovereign should not lead to liability in a private antitrust suit. This principle follows from two general considerations—comity and separation of powers—that traditionally have

influenced the judicial resolution of claims involving the interests of foreign governments, and that together led to the creation of the act of state doctrine. While nothing in the text or legislative history of the antitrust laws expressly discusses considerations of comity or act of state, those doctrines were a well-accepted part of the legal context in which Congress acted when it adopted the Sherman Act. The compulsion of private anticompetitive conduct by a foreign sovereign therefore presents one of the rare instances in which it is proper to read an implied (and thus necessarily limited) defense into the antitrust laws.

The considerations that underlie the sovereign compulsion defense help to shape its scope. Its operation in the international context distinguishes it from the federalism-based state action doctrine; sovereign compulsion accordingly should be available as a defense when the conduct at issue was in fact compelled by a foreign government, for it is in such cases that the imposition of liability by American courts is likely to touch most sharply on foreign concerns, and thus pose the greatest difficulties for the conduct of our foreign relations. Claims of compulsion are appropriately entertained when the foreign government unambiguously informs the court that the conduct at issue was compelled, because in such instances the depth of that government's interest is most clearly expressed. When such a statement is submitted it generally should be deemed conclusive as to the existence and meaning of the foreign sovereign's domestic law. *United States* v. *Pink*, 315 U.S. 203, 220 (1942). And finally, we submit that the separation of powers concerns that infuse the sovereign compulsion defense make that defense unavailable in suits brought by the United States.

Application of these principles demonstrates that the court of appeals erred in relying on the check price agreements as a partial predicate for liability. The government of Japan clearly informed the district court that it had compelled petitioners to enter into and abide by those

agreements. That communication should have precluded the court of appeals from relying on the agreements as a basis for antitrust liability.

ARGUMENT

THE COURT OF APPEALS APPLIED IMPROPER STANDARDS IN OVERTURNING THE AWARD OF SUMMARY JUDGMENT

A. The Court Of Appeals Misapplied This Court's Decision In *Cities Service*

The court of appeals' analysis of the evidence of the alleged anticompetitive conspiracy in this case is inconsistent with this Court's precedents. In *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 280, 285-288 (1968), this Court ruled that an antitrust plaintiff who seeks to prove the existence of an anticompetitive conspiracy on the basis of circumstantial evidence in the form of parallel conduct can defeat summary judgment only by showing that the evidence is more consistent with the inference that the conduct resulted from the alleged conspiracy than with the inference that it resulted from independent action. It follows from this principle that evidence of parallel conduct normally will be probative of an anticompetitive agreement only if it is shown to be inconsistent with the independent competitive interests of the defendants and therefore unlikely to occur in the absence of collusion. See *Kreuzer* v. *American Academy of Periodontology*, 735 F.2d 1479, 1487-1488 (D.C. Cir. 1984); *Weit* v. *Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 462-465 (7th Cir. 1981), cert. denied, 455 U.S. 988 (1982); *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978).[8]

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[8] In *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541-542 (1954), this Court rejected the contention that a conspiracy must be inferred where the plaintiff proved only parallel conduct and the defendants showed that their

The *Cities Service* rule safeguards against the possibility that parallel behavior manifesting only the workings of a competitive market might be deemed illegal, an outcome that "could deter or penalize perfectly legitimate conduct." *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914 (Mar. 20, 1984), slip op. 8. It is particularly important that courts adhere strictly to that rule in a case such as this one, where it is alleged that defendants have violated the antitrust laws by charging prices that are too low. Application of the *Cities Service* principle in such circumstances avoids the imposition of penalties on independent, unilateral conduct that is reducing prices, increasing competition, and thereby directly benefiting consumers.

Here, respondents alleged that petitioners engaged in a broad conspiracy to maintain high prices for television sets sold in Japan and low prices for sets exported to the United States. The district court applied the *Cities Service* standard to evidence of petitioners' parallel conduct (Pet. App. 346a-375a) and concluded that their actions—involving alleged dumping prices and secret rebates—were more reasonably explained as independent competitive behavior than as collusion (*id.* at 494a-502a). The court of appeals implicitly acknowledged the general validity of the *Cities Service* standard.[9] It concluded, however, that the standard was inapplicable here because respondents had adduced not merely evidence of parallel conduct, but also "direct" evidence that petitioners concluded by entering into a resale price maintenance agreement concerning sales in Japan, and by adhering to the check price agreement and the five-company rule in exporting televisions to the United States (Pet. App. 164a-166a). In evaluating the evidence of parallel conduct, the court of appeals accordingly focused only on whether the alleged conspiracy was a plausible explanation for petitioners' conduct, not on whether a fact-finder reasonably could find it to be the more probable explanation.

behavior was consistent with individual self-interest. In cases in which this Court has approved the drawing of an inference of a conspiracy from parallel behavior, that behavior was inconsistent with the hypothesis that each defendant made an independent business decision to act as it did. See, *e.g.*, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 800-808 (1946); *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 222-225 (1939).

[9] See Pet. App. 164a. Although the court of appeals did not mention *Cities Service*, it cited several Third Circuit decisions that applied the *Cities Service* principle.

The existence of the "direct" evidence cited by the court of appeals does not justify a departure from the *Cities Service* standard. That evidence was "direct" only with respect to agreements concerning resale prices in Japan and the use of check prices (that is, minimum prices) and the five-company rule for exports to the United States; at best, the existence of those agreements points up the opportunity for collusive activity, and thus constitutes circumstantial evidence of the existence of the alleged predatory pricing agreement. But that evidence did not have any necessary tendency to establish the existence of the alleged agreement to charge predatory prices in the United States, which the court of appeals found respondents were required to prove to establish antitrust injury (see Pet. App. 167a-168a, 178a).[10] The

[10] As the court of appeals itself stated, private antitrust damage suits can be sustained only where the violations alleged are ones that cause competitive injury to the plaintiff (Pet. App. 167a-168a, 187a-188a). Anticompetitive acts are relevant to a private antitrust action only to the extent that they support claims of competitive injury; they are irrelevant if they suggest harm only to the business or property of some other class of persons. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 484-489 (1977). For example, the court of appeals recognized that an agreement among petitioners that fixed minimum prices for the United States market would tend to keep prices up and would "in isolation protect * * * competitors like [respondents] from competition," so that respondents could not, in the absence of other circumstances, maintain this lawsuit "because they could not show the requisite injury to

"direct" evidence cited by the court of appeals therefore does not obviate the central inquiry required by *Cities Service*—whether the parallel low pricing behavior the court viewed as the crucial element of the alleged conspiracy (see Pet. App. 177a-179a) was more reasonably viewed as the result of independent business decisions by petitioners than as the result of collusion.[11]

Had the court of appeals correctly focused on the *Cities Service* inquiry, it should have concluded that petitioners' parallel pricing conduct was at least as consistent with independent conduct as with the alleged conspiracy. As the district court found (Pet. App. 473a-503a)—in a conclusion that the court of appeals did not reject—the alleged secret rebates and sales at dumping prices were fully consistent with independent efforts by petitioners to penetrate a new market by offering low prices that evaded regulatory constraints imposed by Japan and the United States (that is, Japanese check prices and American antidumping laws). It was not inconsistent with petitioners' independent self interest for them to keep their own rebates secret or to fail to

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their business or property." Pet. App. 178a. To prove antitrust injury under their theory, respondents were required to prove that petitioners agreed to set predatory prices. See *id.* at 177a-179a.

[11] We agree with the court of appeals that "direct evidence of some kinds of concert of action like price fixing in Japan may be circumstantial evidence of a broader conspiracy" (Pet. App. 165a). The issue here, however, is not whether the existence of such evidence bears circumstantially on respondents' charge; instead, it is whether introduction of that sort of circumstantial evidence changes the standard under which otherwise ambiguous parallel conduct is evaluated on motions for summary judgment. To be sure, evidence of conspiracy must be considered as a whole. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). But the teaching of *Cities Service* would be in large part nullified if plaintiffs could find direct evidence of concerted action in one area, hypothesize the existence of a broader conspiracy of which that concerted action may be a part, and then use that evidence as direct proof of the existence of the hypothetical broader conspiracy.

report the secret rebates given by their Japanese rivals, since detection of the rebates could have exposed each petitioner to liability for violations of antidumping laws. Such independent conduct is insufficient to support a finding of conspiracy to violate the antitrust laws under the *Cities Service* standard.

Conversely, the court of appeals' failure to apply the *Cities Service* standard led it to disregard the simple economic illogic of respondents' allegations—a factor tending to suggest that petitioners did not engage in concerted predatory conduct. Respondents' antitrust conspiracy theory turns on the claim that petitioners agreed to charge low prices in the United States market in an effort to drive United States manufacturers out of business. Unless the evidence suggested that petitioners charged unprofitably low prices in the United States market in the short run in hope that long-run sales at monopoly prices would make their strategy profitable overall, a conspiracy would not be the most probable explanation of the evidence and an award of summary judgment would be appropriate.[12] On the other hand, if petitioners sold at prices that were below respondents' costs but nonetheless still were profitable, then petitioners'

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[12] In determining whether there was any evidence to support respondents' predation theory, the court of appeals also should have considered factors other than price. In particular, the court should have examined the structural conditions in the industry to determine whether they made a predatory strategy plausible. In other words, the court should have considered the probable effect on such a strategy of respondent Zenith's large market share, of the presence or absence of barriers to entry and the like. See, *e.g.*, Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213 (1979); Telser, *Cutthroat Competition and the Long Purse*, 9 J. Law & Econ. 259 (1966). The court of appeals entirely failed to consider these matters, however. See generally Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 26-27 (1984) ("The predation-recoupment story [in this case] * * * does not make sense, and we are left with the more plausible inference that the Japanese firms did not sell below cost in the first place. They were just engaged in hard competition."); see also Pet. App. 484a.

behavior would be perfectly consistent with their independent self-interest and, indeed, would represent desirable competition.[13] The court of appeals, however, pointed to nothing in either the market structure or respondents' evidence of below-cost pricing (which consisted almost entirely of expert testimony based on assumptions about petitioners' costs, see Pet. App. 473a, 1056a-1077a) that tended to establish that the evidence of parallel pricing behavior supported a realistic theory of anticompetitive collusion.[14]

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[13] Such considerations have led the courts of appeals to conclude that strong evidence of below-cost pricing is vital to a determination that a low-price strategy amounts to unlawful predation that violates Section 2 of the Sherman Act. See, *e.g.*, *Southern Pacific Communications Co.* v. *American Telephone & Telegraph Co.*, 740 F.2d 980, 1002-1007 (D.C. Cir. 1984), cert. denied, No. 84-1080 (Feb. 25, 1985); *Adjusters Replace-A-Car, Inc.* v. *Agency Rent-A-Car, Inc.*, 735 F.2d 884, 888-891 (5th Cir. 1984), cert. denied, No. 84-793 (Jan. 14, 1985); *Arthur S. Langenderfer, Inc.* v. *S.E. Johnson Co.*, 729 F.2d 1050, 1056-1058 (6th Cir. 1984), cert. denied, No. 84-493 (Nov. 26, 1984); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1031-1039 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982); *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co.*, 651 F.2d 76, 86-88 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982). The Federal Trade Commission has reached a similar conclusion. See, *e.g.*, *International Telephone & Telegraph Co.*, 3 Trade Reg. Rep. (CCH) ¶ 22,188, at 23,081-23,085 (July 25, 1984); *General Foods Corp.*, 3 Trade Reg. Rep. (CCH) ¶ 22,142, at 22,974-22,976 (Apr. 6, 1984).

[14] Indeed, the court of appeals never considered whether respondents had adduced any evidence that petitioners' prices were below any measure of cost. Rather, the court merely characterized respondents' evidence as indicating that petitioners sold "at prices * * * below the prices at which [respondents] could successfully compete," a course that "produced losses" for petitioners. Pet. App. 167a, 179a.

The district court's opinions indicate that respondents' evidence of "below cost" sales consisted solely of the testimony of their chief expert, Dr. DePodwin, that four petitioners sometimes sold their products in the United States at prices below some measure of their costs. Pet. App. 473a, 1065a. Dr. DePodwin's testimony, in turn, was merely "a mathematical construction" based on certain assumptions about petitioners' costs (*ibid.*), even though—as the district court noted—"far more reliable evidence of [petitioners'] costs was available to [respondents] in discovery * * *" (*id.* at 473a n.200; see *id.* at 1065a-1069a).

Cities Service teaches that even the most complicated antitrust cases may be—and should be—resolved on summary judgment when the plaintiff has failed to adduce sufficient evidence of an anticompetitive conspiracy. The district court here devoted extraordinary efforts to devising an innovative and efficient method that would allow a responsible resolution of this massive case without the delay and expense of a trial. The court of appeals' approach, in contrast, makes it considerably more difficult to resolve complex antitrust litigation on motions for summary judgment, thus reducing the opportunities for efficient handling of such litigation. And by raising barriers to the efficient disposition of unmeritorious claims against lawful competitors, that approach would, to a significant extent, undermine the principle of *Cities Service*.

This danger is plainly visible here. The court of appeals' decision has aroused deep concern among our trading partners that foreign manufacturers attempting to penetrate the United States market will be subject to burdensome litigation and the possibility of an award of treble damages if they engage in vigorous price competition. See note 18, *infra*. We agree that the court of appeals' holding would tend to encourage United States companies to use the antitrust laws as a weapon to deter lawful price competition by foreign companies. It is, accordingly, at odds with the basic purpose of the antitrust laws—enhancement of consumer welfare through preservation of a competitive economic system.

B. The Court Of Appeals Erred In Rejecting Petitioners' Foreign Sovereign Compulsion Defense

The court of appeals assumed that key aspects of petitioners' conduct could not have served as a predicate for antitrust liability had that conduct been compelled by

the Japanese government, but the court held that such compulsion had not been demonstrated in this case. The court's assumption—that anticompetitive private conduct should not lead to liability in a private antitrust suit when that conduct is directed by a foreign sovereign—is in accord with suggestions by this [15] and other courts,[16] and was, we submit, correct. The court of appeals erred, however, in holding that petitioners were not entitled to assert the defense here.

1. a. Implied defenses to the antitrust laws are strongly disfavored. See, *e.g.*, *National Gerimedical Hospital* v. *Blue Cross*, 452 U.S. 378 (1981). But when Congress enacted the Sherman Act in 1890, it was legislating against the background of general principles that traditionally have influenced the judicial resolution of claims involving the interests of foreign governments. American courts long have recognized that considerations of comity among sovereign nations—the idea that foreign nations are due deference when acting within their legitimate spheres of authority—play a role in determining

[15] In *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-707 (1962), antitrust defendants contended that the Canadian government had compelled them to engage in the anticompetitive acts there at issue. This Court concluded, however, that the defense was not available because there was "no indication that [any] official within the * * * Canadian Government approved or would have approved of" the anticompetitive conduct, or that any Canadian law otherwise compelled the conduct. The Court had no occasion to discuss a situation in which, as here, the record includes a statement by a foreign government that it *has* compelled some or all of the allegedly anticompetitive conduct at issue.

[16] See *Mannington Mills, Inc.* v. *Congolcum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979); *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 606-607 (9th Cir. 1976); *Linseman* v. *World Hockey Ass'n*, 439 F. Supp. 1315, 1324 (D. Conn. 1977); *Interamerican Refining Corp.* v. *Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1297-1298 (D. Del. 1970); *United States* v. *Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cas. (CCH) ¶ 70,600, at 77,456-77,457 (S.D.N.Y. 1962). *Texaco Maracaibo* is the only case in which the defense has been raised successfully.

"the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895). See generally *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963); *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953); *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). And limits on the judiciary's role in resolving disputes with foreign overtones have been inspired by the relative "competence and function[s] of the Judiciary and the National Executive in ordering our relationships with other members of the international community." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964). See *Underhill* v. *Hernandez*, 168 U.S. 250 (1897). In combination, these two notions—"comity among nations and among the respective branches of the Federal Government" (*First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972) (plurality opinion))—have led to the creation of the act of state doctrine as a principle of judicial abstention in resolving disputes concerning the validity of foreign sovereign acts. See *Sabbatino*, 376 U.S. at 423; *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 705-706 n.18 (1976) (opinion of White, J.); *id.* at 726-728 (Marshall, J., dissenting).

Nothing in the text or legislative history of the antitrust laws expressly creates a defense based on, or otherwise in terms discusses, considerations of comity or act of state. But those principles were uniformly recognized as a prominent part of the "contemporary legal context in which Congress acted" when it adopted the Sherman Act. *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 532 (1983). See *Sabbatino*, 376 U.S. at 416; *Hilton*, 159 U.S. at 163-165. Indeed, the concerns that underlie those principles—in particular, the "strong sense" repeatedly expressed by the judiciary that its involvement in the resolution of questions directly touching on the interests of other nations may in some circumstances "hinder

rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere" (*Sabbatino*, 376 U.S. at 423) —traditionally have been regarded as central features of American jurisprudence. In light of these considerations, the compulsion by a foreign sovereign of private anticompetitive conduct such as that at issue here presents one of the rare instances in which it is proper to read an implied (and thus necessarily limited) defense into the American antitrust laws. Cf. *Sociedad Nacional*, 372 U.S. at 21, citing *The Charming Betsy*, 6 U.S. (2 Cranch) at 118.

b. That the theoretical principles justifying a defense based on foreign sovereign compulsion serve very real ends is demonstrated by the practicalities of international commerce. It is, of course, settled law that the Sherman Act can reach even those anticompetitive restraints that occur wholly overseas but have a direct, substantial and reasonably foreseeable effect on American commerce. See Foreign Trade Antitrust Improvements Act of 1982, § 402, 15 U.S.C. 6a; *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927); *United States* v. *Alcoa*, 148 F.2d 416 (2d Cir. 1945). This potentially brings within the reach of the antitrust laws an enormous and growing body of commerce. In 1980, the United States' trade with some 150 foreign nations involved exports and imports valued at more than $606 billion. 2 OECD, *National Accounts 1964-1981*, at Table 15 (1983). In just the last two decades, the value of the goods and services imported by the United States has increased from $27 billion in 1964 to more than $365 billion in 1983. *Ibid.*; *Statistical Abstract of the United States* 800 (1985).

Not surprisingly, the United States' trading partners often manage their domestic economic systems and international affairs in ways that differ from ours. For political or other reasons, foreign nations sometimes cartelize important segments of their economies, and the compelled anticompetitive conduct may well affect our commerce.

And some of our most significant trading partners—including, very notably, Japan (see Pet. App. 25a-26a)—occasionally compel anticompetitive conduct expressly to accommodate the desires of the United States; to give just one example, Australia very recently effectuated a trade agreement with the United States by directing its steel makers to limit their exports to this country. See Letter from Assistant Attorney General J. Paul McGrath to Australia Charge d'Affaires Kenneth McDonald (Jan. 18, 1985) (a copy of which has been lodged with the Court by petitioners).[17]

This highly complex pattern of American trade suggests that an unlimited application of the antitrust laws in the international context would have far-reaching and potentially destructive results. It plainly would "touch • • • sharply on national nerves" (*Sabbatino*, 376 U.S. at 428) were American courts to hold foreign firms liable for engaging in conduct that is compelled by their home nations, a development that "would inevitably lead to embarrassment in foreign affairs." *Sociedad Nacional*, 372 U.S. at 19.[18] In a system of international trade where the United States can be found negotiating *for* certain export restraints, failure to recognize a limited sovereign compulsion exception to the Sherman Act necessarily would "interfere with delicate foreign relations conducted by the political branches." *City Bank*, 406 U.S. at 775-776 (Powell, J., concurring). Conversely, the litigation of private antitrust actions could well im-

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[17] In establishing national policy for the steel industry, President Reagan has directed the United States Trade Representative to negotiate restraint agreements with a number of exporting countries. 49 Fed. Reg. 36813 (1984).

[18] The Governments of Australia, Canada, France, Japan, the Republic of Korea, Spain, and the United Kingdom have formally advised the Department of State of their concerns about the potential impact of the court of appeals' decision. Copies of these communications have been lodged with the Clerk of the Court and provided to counsel.

pede diplomatic efforts to undo foreign compulsion of anticompetitive conduct. In these circumstances, it is evident that the problems posed by compelled anticompetitive activity can, as a general matter, better be addressed through the exercise of executive discretion than by means of the "'[p]iecemeal dispositions' that courts could make" in the course of private litigation. *Id.* at 786 (Brennan, J., dissenting) (citatior omitted), quoting *Sabbatino*, 376 U.S. at 432. See *City Bank*, 406 U.S. at 769-770 (plurality opinion); *Sabbatino*, 376 U.S. at 431-433; *International Ass'n of Machinists* v. *OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982). Cf. *Dames & Moore* v. *Regan*, 453 U.S. 654, 675-688 (1981).[19]

2. a. The considerations that underlie the foreign compulsion defense help to shape its appropriate scope. As this Court's treatment of the question in *Continental Ore* (see note 15, *supra*) and the uniform analysis of the lower courts (see cases cited at note 16, *supra*) suggest, the defense is applicable when the conduct at issue was in fact compelled by a foreign sovereign. In such cases the use of the challenged conduct as a predicate for the imposition of liability by American courts is likely to touch most sharply on foreign concerns and pose the greatest difficulties for the conduct of our foreign relations. Cf. *Sociedad Nacional*, 372 U.S. at 21.

These same considerations, moreover, distinguish sovereign compulsion from the state action doctrine, which provides a defense in antitrust challenges to conduct that is authorized and actively supervised by a state. See *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, No. 82-1922 (Mar. 27, 1985), slip op. 8-9. The state action defense is grounded on principles of federalism, in particular on the notion that Congress should

[19] We do not mean to suggest, however, that the sovereign compulsion defense should apply if deference to the foreign state's action clearly is unwarranted under recognized principles of international comity.

not be presumed to have interfered with state authority to regulate commerce. *Id.* at 12; *Parker* v. *Brown*, 317 U.S. 341, 351 (1943). Because the federal structure is designed to secure to the states the greatest possible "range of regulatory alternatives" (*Southern Motor Carriers*, slip op. 12), the Court has held that a requirement of state compulsion is too strict a standard for general use in state action cases—with the federal government, as a safeguard, always retaining authority under the Supremacy Clause to void any obnoxious state cartel program that has an effect on interstate commerce. Cf. *Parker*, 317 U.S. at 350; *Southern Motor Carriers*, slip op. 2 (Stevens, J., dissenting). In contrast, the sovereign compulsion defense serves the quite different purpose of forestalling direct clashes with the most significant interests of other sovereigns. This purpose is advanced most directly by bringing the defense into play only when the foreign government has compelled the challenged activity.

In addition, several quite significant practical considerations suggest that the state action standard is not easily transferred to the foreign context. The complexity and novelty of foreign legal systems—and the concomitant difficulty faced by domestic courts in precisely determining their requirements—would present private firms with innumerable opportunities for evasion of antitrust requirements were any arguable "authorization" of the challenged conduct sufficient to give rise to the defense. Similarly, the use of an active supervision standard of the sort applied in state action cases would require domestic courts to conduct difficult and troubling inquiries into the foreign sovereign's conduct of its own affairs. Cf. *Sabbatino*, 376 U.S. at 415; *Sociedad Nacional*, 372 U.S. at 19.

We are not prepared at this time to suggest that there is any application of the sovereign compulsion defense that would be appropriate in the absence of actual compulsion by the foreign government. Surely the mere fact that a trade restraint is consistent with the law of a for-

eign national's home state is not in itself a defense to an antitrust violation. Nor should it lightly be inferred that Congress intended to defer to foreign sovereigns to prescribe the norms for the volitional conduct of private persons concerning trade restraints directly affecting competition in the United States. This question, of course, need not be addressed by the Court until it is squarely presented in a particular factual setting.

b. The interests underlying the defense also shed light on the manner in which claims of sovereign compulsion should be presented to a United States court. The defendant, of course, bears the burden of raising and proving such an affirmative defense. See Fed. R. Civ. P. 12(b). And because the defense is designed to forestall interference with foreign sovereign action and concomitant embarrassment in our dealings with foreign governments, claims of compulsion are most appropriately entertained when the foreign government, either directly or through the State Department, informs the court that the conduct at issue was in fact compelled.[20] It is in such instances that the depth of the foreign government's concern and the possibility of diplomatic friction following from further court proceedings will be most clearly expressed. Cf. *Dunhill*, 425 U.S. at 695. In the absence of such communication, the particular interests served by the defense—as well as the narrow reading given to all implied defenses to antitrust liability—require that any claimed compulsion be demonstrated with clarity.[21]

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[20] This Court has approved a procedure under which a foreign government may convey its views to the Court directly in cases in which it has an interest by the filing of a brief amicus curiae. See 73 Am. J. Int'l L. 124 (1979). The State Department has encouraged foreign governments to communicate their views directly to United States courts. See *ibid.*; *id.* at 678-679.

[21] In the circumstances of this case (see pages 24-26, *infra*), there is no need for the Court to decide whether a compulsion defense may succeed in the absence of a direct communication from the foreign government. Cf. *Texaco Maracaibo*, 307 F. Supp. at 1299-1301.

Once a foreign government presents a statement dealing with subjects within its area of sovereign authority, however, American courts are obligated to accept that statement at face value; the government's assertions concerning the existence and meaning of its domestic law generally should be deemed "conclusive." *United States* v. *Pink*, 315 U.S. 203, 220 (1942). For such deference to be appropriate, of course, the statement must be clear and intelligible. Plainly ambiguous or internally inconsistent statements need not be treated as dispositive. See *United Nuclear Corp.* v. *General Atomic Co.*, 96 N. Mex. 155 (1980), appeal dismissed, 451 U.S. 901 (1981). And in extraordinary circumstances, concern for the integrity of the judicial process may obligate a court to inquire into the underlying circumstances if it believes that it has been presented with a statement that is incredible on its face. Cf. *Texaco Maracaibo*, 307 F. Supp. at 1300.

c. Finally, we note that, in our view, the principles giving rise to the defense indicate that the sovereign compulsion doctrine should not apply in antitrust suits brought by the United States.[22] In such cases, the "governmental enforcement [decision] represents a judgment on the wisdom of bringing a proceeding, in light of the exigencies of foreign affairs." *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 712 F.2d 404, 409 (9th Cir. 1983), cert. denied, No. 83-546 (Jan. 9, 1984). A decision to bring suit thus amounts to a determination by the executive branch that the challenged conduct is more harmful to the United States than is any potential injury to our foreign relationships that will follow from the antitrust action.[23] Because separation of

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[22] To the best of our knowledge, foreign sovereign compulsion has not been found in any case heretofore brought by the United States and is not involved in any pending case.

[23] There may, of course, be circumstances in which the United States would deem it more appropriate to engage in diplomatic efforts to persuade the foreign sovereign to cease compelling the conduct (or to take no action at all) rather than to bring suit.

powers concerns infuse the compulsion defense, the conclusion that the defense is inapplicable in suits by the United States can be regarded as merely "an application of the classical common-law maxim that '[t]he reason of the law ceasing, the law itself also ceases.'" *City Bank*, 406 U.S. at 768 (plurality opinion), quoting *Black's Law Dictionary* 288 (4th ed. 1951). For this reason, the courts in related contexts have found deference to the executive branch appropriate. See, *e.g.*, *Mexico* v. *Hoffman*, 324 U.S. 30, 34 (1945) (deferring to executive decisions relating to foreign sovereign immunity); *National Bank* v. *Republic of China*, 348 U.S. 356, 358 (1955) (deferring to executive decisions relating to diplomatic relations); *City Bank*, 406 U.S. at 768-770 (plurality opinion) (deferring to executive decisions relating to applicability of the act of state doctrine).[24]

3. Application of the principles discussed above to the facts of this case demonstrates the court of appeals' error. Respondents identified the check price agreements and the five-company rule as integral parts of petitioners' alleged conspiracy. Petitioners responded that those agreements had been compelled by the Government of Japan, and therefore could not serve as a basis for the imposition of antitrust liability. In support of this defense, petitioners relied on MITI's 1975 statement to the district court. That document affirmed that both the check price agreements and certain regulations of the Japan Machinery Exporters Association (which included the five-company rule) "have come into existence pursuant to the direction of MITI" (Pet. App. 8a). After a detailed discussion of MITI's powers and of its involvement in the creation and

[24] Indeed, the same result would follow in virtually every case from either our contention that the defense is wholly inapplicable in suits by the United States, or from an alternative theory that the defense presumptively should be unavailing in such cases because the judgment implicit in the executive's decision to bring suit—that the legitimate interests of the United States in proceeding outweigh those of the other concerned government—is entitled to great deference.

implementation of the agreements and regulations at issue, the statement then added (*id.* at 12a) that when MITI

> directed [petitioners] to conclude * * * such agreement and regulation relating to the minimum prices at which televisions could be sold for the United States market and other matters, [petitioners] had no alternative but to establish the agreement and regulation in compliance with said direction.

MITI also declared that it had exercised "direction and supervision concerning minimum prices at which televisions could be sold for exportation to the United States * * * continuously from 1963 until February 28, 1973" (*id.* at 11a).

This detailed MITI statement clearly establishes that the Japanese government both compelled petitioners to agree on minimum export prices for televisions and supervised implementation of those check price agreements. The statement therefore should have precluded respondents from relying on the agreements as a basis for the alleged antitrust violation. In rejecting petitioners' defense, however, the court of appeals never referred explicitly to the MITI statement and largely disregarded its content. Instead, the court asserted that "[i]t is possible to conclude that the [Japanese] government merely provided an umbrella under which [petitioners] gained an exemption from Japanese antitrust law, and fixed their own export prices" (Pet. App. 189a), adding that it found "abundant evidence suggesting that many [petitioners] departed from the agreed-upon minimums and took steps to conceal their departure from MITI" (*ibid.*).

This analysis misstates both the nature of the sovereign compulsion defense and the substance of the MITI statement.[25] If the court meant to suggest that the check prices

[25] Respondents have contended (Br. in Opp. 22-23) that petitioners failed to preserve their argument concerning sovereign compulsion. The pleadings make it plain, however, that petitioners

charged by petitioners were not in fact compelled, its holding unjustifiably disregarded a clear and dispositive statement to the contrary by the Japanese government. Nor is there merit to the court's suggestion that it was free to ignore the compelled nature of the check price agreements because petitioners allegedly used those agreements as a cloak for their efforts to fix prices at lower levels, in violation of both American and Japanese law. While it is true that sovereign compulsion does not shield conduct violative of foreign as well as American law, here the court of appeals treated the compelled check price agreements *themselves* as evidence supporting "an inference of collective predatory intention" (Pet. App. 179a).[26] The court of appeals thus erred in rejecting out-of-hand petitioners' sovereign compulsion defense.

That defense, of course, means only that compelled conduct may not serve as a predicate for antitrust liability. Even in cases involving such activity, plaintiffs may sustain a claim by adducing sufficient independent evidence

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did raise the argument in the court of appeals (see petitioners' brief (at 37-44 & n.34) filed in the court of appeals) and that respondents disputed the point at length (see respondents' reply brief (at 79-88) filed in the court of appeals). The district court did not decide the foreign compulsion issue because it ruled for petitioners on other grounds (see Pet. App. 255a n.19, 387a-394a).

[26] The court of appeals also asserted that there is "no record evidence suggesting that the five-company rule originated with the Japanese Government" (Pet. App. 189a). While this conclusion may be overly technical—the MITI statement referred to the regulations of the Japan Machinery Exporters Association rather than to the rule itself—we do not at this point dispute the court's conclusion that the Government of Japan failed to spell out its role in the creation of the rule with sufficient clarity. After the filing of the petition for certiorari in this case, however, the Japanese government transmitted a Note Verbale to the State Department, in which it stated unequivocally that it had compelled adoption of the five-company rule. See Br. of Government of Japan App. 2a. In the unusual circumstances of this case, the Court may appropriately choose to treat this clear, definitive statement of the Japanese government as dispositive on this point.

of anticompetitive activities. As we have shown at pages 9-15, *supra*, however, respondents failed to offer such evidence in support of their theory. The insufficiency of respondents' evidence is exacerbated by the removal of the check price agreements as a basis for the imposition of treble damages liability on petitioners.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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* Acting Solicitor General Fried is disqualified in this case.

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